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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 369

EPHRAIM FREIGHTWAYS, INC., Petitioner

v.

RED BALL MOTOR FREIGHT, INC., Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court was an unreported interlocutory order, and has been set forth verbatim in the Appendix to the Petition. The opinion of the Circuit Court, which is reported at 376 F.2d 40, has also been reproduced in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites have been adequately set forth in the Petition.

QUESTION PRESENTED

Whether in this action in the District Court, in which the complaint seeks equitable relief, an admittedly interlocutory order, which denied a motion by the defendant to stay the action pending the outcome of an entirely separate controversy involving different parties before a state administrative agency, constitutes the refusal of an "injunction" by the District Court which may be appealed as such under the provisions of 28 U.S.C. § 1292 (a) (1).

STATUTE INVOLVED

The pertinent provisions of Section 1292 (a) (1), Title 28, United States Code, are contained in the Appendix to the Petition.

STATEMENT

This litigation had its inception in a complaint filed by the Respondent, as Plaintiff in the District Court, alleging that the Defendant, which is the Petitioner here, is engaged in certain activities contrary to the Colorado laws governing operations by common and private (contract) carriers by motor vehicle. An injunction is sought against the complained of activities, together with related damages for such activities in the past (R. 1-11). Jurisdiction was founded and exisits on the basis of diversity of citizenship between the parties and the requisite value of the matter in controversy (R. 1, 77, 86). The parties will be referred to by the positions they occupy here.

The action in the District Court was commenced on August 11, 1965 (R. 1). Thereafter, the Petitioner filed a series of motions attacking jurisdiction and the sufficiency of the complaint and to postpone discovery proceedings (R. 16-20, 30, 32). Ultimately, after extensive briefs and hearings, those motions were denied (R. 36, 39). The Petitioner then filed its answer to the complaint on January 17, 1966 (R. 43). After a pre-trial conference on March 4, 1967 (R. 71), the Petitioner amended its answer to incorporate certain additional defenses (R. 69). It should be noted that neither the original answer, nor the amended answer filed

March 11, 1967, raised any defense or interposed any objection to proceeding with the action because of the then pending proceeding before the Colorado Public Utilities Commission in the so-called *Miller* case[1/] which was later, on the eve of trial, to be invoked as a reason for indefinitely staying the action. However, as the record shows, the *Miller* case had been pending before the state commission since January 5, 1966 (R. 74D), and the Petitioner had served its motion to intervene in that administrative proceeding on March 10, 1966 (R.74R). Despite its obvious awareness of that proceeding before the state commission, the Petitioner did not advance the pendency thereof as a basis for staying the action in the District Court until its "motion to stay" which was eventually filed on April 29, 1966 (R. 74A). That motion was denied by an order of the District Court on July 20, 1966 (R. 83), which became the point of departure for the Petitioner's appeal to the Circuit Court (R. 99).

In denying the motion to stay the District Court was of the opinion that the situation did not warrant abstention from exercising its admitted jurisdiction in the case before it (R. 83-84). The Circuit Court did not reach that question, since it held that under the circumstances of the case the clearly interlocutory ruling of the District Court was not appealable as the equivalent of an order "refusing an injunction" within the meaning of 28 U.S.C. § 1292 (a) (1), which the Petitioner itself concedes to be the only possible jurisdictional basis for the appeal. The basis of the holding by the Circuit Court was an application of the established rule, enunciated in a series of cited opinions of this Court, that an interlocutory order of a district court granting or refusing a stay of a pending action is not appealable under the governing statute unless, first, the action against which the stay would operate is essentially a legal rather than an equitable proceeding, and, secondly, the stay was sought to permit the prior determination of a related equitable matter

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1/ *Denver Laramie Walden Truck Line, Inc. et al* v. *Miller Brothers, Inc.*; Case No. 5314, Colorado Public Utilities Commission (R. 74D).

(376 F.2d at 41). The Circuit Court found that neither of the conditions to the limited appealability of such orders was met in the present case, and accordingly dismissed the appeal. The Petitioner now seeks a writ of certiorari to review the action of the Circuit Court. The Respondent opposes the issuance of the writ on the grounds that this is not an appropriate case for the exercise of certiorari jurisdiction by the Court, and that, in any event, the decision of the Circuit Court is manifestly correct and in harmony with the prior opinions of this Court and the decisions in other circuits.

ARGUMENT

There is nothing about the present case to occasion review by this Court on certiorari. The only question raised by the Petitioner concerns the routine application by the Circuit Court of established principles limiting its own appellate jurisdiction over a purely interlocutory order by the District Court. In such a case, it has been said before that "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co.* v. *Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893).[2/] No reason for departing from that policy suggests itself here. From the Petitioner's side, the worst that can be claimed is that it will probably otherwise face an earlier trial in the District Court on the merits of a suit admittedly within the jurisdiction of that court. There is no showing as to how any extraordinary inconvenience or embarrassment, other than perhaps the potential hazzards of litigation to any defendant, could be even temporarily spared by undertaking review of the case at this time.

Moreover, the petition presents no important or pressing federal question, entails no constitutional problem, ex-

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2/ See, also, *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 584-5 (1952); *Cobbledick* v. *United States*, 309 U.S. 323, 324-5 (1940); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916).

poses no conflict in decisions, nor raises any other circumstance which might call for the exercise of this Court's jurisdiction over the matter. The arguments made for granting the writ plough fields already well marked. Indeed, the Petitioner itself concedes, at page 5 of the Petition, that "the court below had an apparently reasonable basis for ruling as it did" in terms of what the Petitioner styles as the "language" of certain prior opinions by this Court. To the same effect, confronted with unanimity among the decisions of the circuit courts in dealing with the jurisdictional question involved, at page 7 of its Petition the Petitioner is relegated to the notion that the purpose of 28 U.S.C. § 1292 (a) (1), at least as the Petitioner sees it, "is being frustrated by the courts of appeal". However novel the Petitioner's approach may be, it falls at the threshold in failing to comprehend the holdings of the decisions it attempts to distinguish and disparage.

Structurally, the Petitioner erects its entire argument upon the quotation of an incomplete sentence from the opinion in *Shanferoke Coal & Supply Corporation* v. *Westchester Service Corporation,* 293 U.S. 449 (1934), coupled with a fragmentary excerpt from a dissenting viewpoint in *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176 (1955). The selective references to those decisions misses their meaning.

The *Shanferoke* case, upon which the Petitioner places its chief reliance, necessarily derives much of its meaning from another case which was decided the same day, *Enelow* v. *New York Life Insurance Co.,* 293 U.S. 379 (1935), which is the source of the doctrine followed and applied as controlling in *Shanferoke.* The *Enelow* case involved an action at law to recover upon a policy of life insurance, in response to which the defendant insuror set up certain equitable defenses. The defendant then moved that the "equitable issue" raised by its defense be determined by the court, functioning as a chancellor in equity, in advance of a jury trial on the action at law initiated by the complaint. This, of course, was tantamount to a motion to stay the action at

law. The District Court granted the motion, and was affirmed by the Circuit Court on appeal. On certiorari, this Court upheld the appealability of the order granting the stay under the provisions of former Section 129 of the Judicial Code, which now appear essentially intact in Section 1292 (a) (1) of the Code, stating as follows:

> "This section contemplates interlocutory orders or decress which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of Sec. 129. And, in this aspect, it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court, in view of the established distinction between 'proceedings at law and proceedings in equity in the national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity'" (293 U.S. at 381-2).

The foregoing reasoning also clearly dictated the result which was reached the same day by the brief opinion in *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp., supra,* on which the Petitioner bottoms its argument here. In that case the Court was dealing with an action at law to enforce a contract for the sale of coal, in connection with which the defendant interposed a motion to stay the action on the basis that the contract required prior resort to arbitration. Holding that under the circumstances

the order of the District Court denying the stay was appealable under the forerunner of the statutory provision presently in question, this Court applied the doctrine of *Enelow*. In that connection, the Petitioner clearly misses or disregards the basis of the holding in *Shanferoke,* and patently distorts the meaning of that case by citing it for the blunt proposition, quoted out of context at page 5 of the Petition, that a "motion for a stay is an application for an interlocutory injunction". No such simple proposition was laid down in that case. What the Court actually said there appears very clearly when the isolated and incomplete statement relied upon by the Petitioner is placed back in context, as follows:

> "For the reasons stated in *Enelow* v. *New York Life Ins. Co.,* decided this day, *ante,* p. 379, an order granting or denying a stay based on an equitable defense or cross-bill interposed in an action at law under Sec. 274b, is appealable under Sec. 129. We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill within the meaning of Sec. 274b; and that a motion for a stay is an application for an interlocutory injunction based on the special defense" (293 U.S. at 452).

Thus, it is readily seen that the true holding of the *Shanferoke* and *Enelow* cases, which the Petitioner grossly misinterprets and misapplies, lays down only a very narrow exception to the general rule precluding appeals from interlocutory orders granting or denying stays of proceedings. That exception operates only when, in theory, a court of equity has in effect restrained or refused to restrain proceedings in a pending action or law, or, in the words used by the Court in *Enelow,* when the trial court "in effect grants or refuses an injunction restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose" (293 U.S. at 383).

Subsequent decisions by this Court dealing with the

same point have uniformly applied and reinforced the same rule. Thus, while the rationale of *Enelow* and *Shanferoke* was deeply rooted in historical distinctions between common law and equity practice, the doctrine formulated in those decisions survived the abolition of formalism between legal and equitable proceedings under the Federal Rules of Civil Procedure. This is made clear in *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942), where the Court, following *Enelow*, again restricted the appealability of interlocutory orders granting or refusing a stay of proceedings to a situation in which an action which formerly would have been cognizable at law was stayed in order to allow a related equitable matter to be determined first. There, a stay which operated against an action at law to provide for the prior determination of an equitable counterclaim was held by the Court to be "as effective in these respects as an injunction issued by a chancellor," and for purposes of appealing that order the appellants were viewed as being "in no different position than if a state equity court had restrained them from proceeding in the law action" (317 U.S. at 192).

The *Enelow, Shanferoke,* and *Ettelson* cases all upheld the appealability, under the interlocutory injunction rationale, of orders dealing with stays of actions at law which were sought to permit the prior determination of a related equitable matter, such as a defense or counterclaim. The converse of the situation was presented for the first time in *City of Morgantown* v. *Royal Insurance Co., Ltd.*, 337 U.S. 254 (1949). There, the question concerned the appealability of an interlocutory order governing the manner of proceeding with a trial in an action in which equitable relief was sought by the plaintff and where the defendant interposed a legal counterclaim. While the precise question in *Morgantown* concerned an order of the District Court denying the defendant's demand for a jury trial, in holding that order to be non-appealable, this Court deemed it necessary to distinguish and explain its prior holdings in the *Enelow* and *Ettelson* cases. It did so on the basis that the circumstances before it, unlike those in the

prior cases, did not present "a situation where a 'chancellor' in denying the demand for jury trial can be said to be enjoining a 'judge' who has cognizance of a pending action at law" (337 U.S. at 257). Further explication of that distinction was set forth in the concurring opinion of Mr. Justice Frankfurter, who viewed the difference between actions at law and suits in equity as decisive to the appealability of interlocutory stay orders. After pointing out that both of the prior decisions in *Enelow* and *Ettelson* had involved stays of actions at law in order to allow for a prior equitable determination of a related claim or defense, and were thus tantamount to and appealable as interlocutory injunctions under the forerunner of 28 U.S.C. Sec. 1292 (a) (1), Justice Frankfurter emphasized the difference in *Morgantown* as follows:

> "A layman may see no difference between the postponement by a trial judge of an action at law, and the postponement of such an action by an equitable proceeding resulting in an interlocutory injunction. But the Congress has seen fit to allow an appeal from one such result and not from the other. Non-appealability of intermediate orders in the federal courts has been a deep-rooted general principle limiting those courts since their establishment. A very few types of interlocutory orders are appealable. The *Enelow* and *Ettelson* cases presented an order that was appealable because it was a stay by a court of equity of a common-law action. This is not such a stay, and in affirming the judgment the Court leaves *Enelow* and *Ettelson* untouched."

The final and presently definitive exposition of the doctrine controlling the present case occurred in *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176 (1955). Involved there was an action seeking equitable relief, where the defendant moved for a stay pending arbitration under the contract upon which the action was founded. The motion to stay was denied, and the Court of Appeals for the Sec-

ond Circuit, relying upon *City of Morgantown* v. *Royal Insurance Co., supra,* dismissed the appeal from that interlocutory order. Of special pertinence here, in affirming the denial of the appeal in the *Bodinger* case this Court took special pains to point out the basic distinction, which governs here, between orders staying or refusing to stay actions at law to permit a related equitable proceeding to go first, which are appealable under the statute as orders granting or refusing injunctions, on the one hand, and, on the other hand, other types of interlocutory orders concerning stays of proceedings which are not appealable either because the suit sought to be stayed is itself equitable, or because the stay is not sought to allow the prior determination of what is an equitable matter. Clearly explaining the difference in treatment of such orders for the purposes of interlocutory appeal, the opinion of this Court in *Bodinger* states:

> "The *Morgantown* case controls here. Whether the District Court was right or wrong in its ruling that the contract provision did not require arbitration proceedings, it was simply a ruling in the only suit pending, actual or fictional. It was a mere order and not an injunction as that word is understood through the *Enelow* and the *Ettelson* cases as a stay through equitable principles of a common-law action. This present case is to be distinguished from the *Shanferoke* case, *supra,* note 5, in the same way. There in a common-law action a motion for an interlocutory injunction on an equitable defense was refused.

The distinction has apparently escaped the Petitioner, which is now pursuing an application for certiorari on the notion, expressed at page 5 of the Petition, that the present case presents an excellent opportunity to announce, "once and for all", the "distinction" between cases such as *Shanferoke* and *Morgantown,* and to "reconcile them" with the governing statute. In light of what has been said most recently in the *Bodinger* case, however, particularly in the

portion of the opinion in that case which has been quoted immediately above, the Petition for review in the present case appears to seek an exercise in tautology.

The doctrine which evolved through the series of five decisions of this Court which have been discussed above is today firmly cemented in the law. As the Petitioner recognizes, the Circuit Courts have uniformly followed that doctrine in a host of cases confining the appealability of stay orders to situations where an action at law has been stayed or sought to be stayed to allow a prior and related equitable determination. A by no means exhaustive survey would disclose prior decisions to that effect in the Second, Third, Fourth, Fifth, Sixth, Ninth and District of Columbia Circuits. See, e.g., *Wilson Brothers* v. *Textile Workers of America* (2nd Cir. 1955), 224 F.2d 176, cert. den. 350 U.S. 834; *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.* (2nd Cir. 1965). 340 F.2d 160, cert. den. 381 U.S. 924; *Schine* v. *Schine* (2nd Cir. 1966), 367 F.2d 685; *United States* v. *Horns* (3rd Cir. 1945), 147 F.2d 157; *Kirschner* v. *West Company* (3rd Cir. 1962), 300 F.2d 133; *International Nickel Co.* v. *Martin J. Barry, Inc.* (4th Cir. 1953), 204 F.2d 583; *Jackson Brewing Co.* v. *Clarke* (5th Cir. 1962), 303 F.2d 844, cert. den. 371 U.S. 891; *Dowling Brothers Distilling Co.* v. *United States* (6th Cir. 1946), 153 F.2d 353; and *Travel Consultants, Inc.* v. *Travel Management Corp.* (D.C. Cir. 1966), 367 F.2d 334.

The decision of the Circuit Court in the present proceeding was clearly justified and dictated by the definitive prior opinions of this Court, and is squarely in line with a substantial body of precedent in the other circuits. Simply stated, the appeal in the present case failed to meet either of the conditions for appealability of stay orders which have become firmly engrafted upon 28 U.S.C. § 1292 (a) (1). In the first place, the action in this matter before the District Court is one in which injunctive relief is being sought by the complaint, and is therefore clearly equitable in nature, even though an award of damages for past activities is also sought in order to obtain complete relief. *Mitch-*

ell v. *DeMario Jewelry,* 361 U.S. 288 (1960); *Schine* v. *Schine, supra.* The Petitioner disputes this, apparently on the theory that the magnitude of the damages sought in itself classifies the case as an action at law. No authority is cited for that proposition, however, and it is doubtful that any such exists. In that regard, it is notable that for other purposes the Petitioner prefers to concentrate on the dominant equitable character of the suit, as for example in attempting to shore up the importance of the case by pointing out that the injunction which is sought "would virtually put defendant out of business". While that tends to exaggerate somewhat, no one reading the pleadings could seriously doubt the classical equity proportions of the case in terms of the injunction being sought. Accordingly, under the holding of *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176 (1955), an interlocutory appeal from the order denying the stay of the proceeding does not lie.

Secondly, even if the action in the District Court could be regarded as essentially legal in nature, the appeal was also without jurisdictional footing because the stay was not sought to permit the prior determination of any related equitable matter. Instead, the sole and only purpose of the stay which was sought was to postpone the action indefinitely until a determination by the Colorado Public Utilities Commission of the *Miller* case, which is an entirely separate proceeding between different antagonists. Clearly, the separate administrative proceeding pending before the Colorado Commission is in no sense the equivalent of an equity suit or matter having relation to the present action. In an analogous situation, following the doctrine of limited appealability of interlocutory stay orders discussed above, the Court of Appeals for the Second Circuit refused to entertain an appeal from a District Court order staying an anti-trust suit pending further related proceedings before the Civil Aeronautics Board, stating:

> "Under Section 1292 (a) (1) an order staying proceedings, to be appealable, must have stayed a legal action to allow prior trial of an equitable defense

> or counterclaim . . . But the weight of authority has refused to equate administrative proceedings which have been allowed priority with historical equity action." *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.* (2nd Cir. 1965), 340 F.2d 160, cert. den. 381 U.S. 924.

The order denying the stay in the present action is even a step further removed from appealability. Here, the difficulty is not only that the *Miller* case cannot be equated with historical equity proceedings, but it lacks any real nexus with the litigation in the District Court. While the two proceedings may superficially share some common issues, they are by no means interdependent. The Respondent is not a party in *Miller,* and while the Petitioner is perhaps nominally so, solely as a result of venturing to intervene in that proceeding, no claim is asserted in that controversy either by or against the Petitioner. Accordingly, to state, as the Petitioner does, that it will be "bound" by the decision in *Miller* is a rather deceptive use of the term. Certainly, nothing which has been undertaken nor which can be decided by the Public Utilities Commission in the *Miller* case will conclusively adjudicate the legality of the Petitioner's activities which have been challenged in the present action, nor can any possible outcome of the *Miller* proceeding obviate a trial in the present case or, for that matter, predetermine any of the issues in this case. The Colorado Public Utilities Commission is not a court of any sort, and is altogether impotent to render authorative declarations of the law. *Pirie* v. *Public Utilities Commission,* 72 Colo. 65, 209 P. 640; *Public Utilities Commission* v. *Manley,* 99 Colo. 153, 60 P.2d 913, 919. Consequently, even if the proceeding before the Colorado Public Utilities Commission were exalted to a status equivalent to an equity proceeding, and even if the present case were to be regarded as involving merely an action of law, the lack of any essential interrelationship between the proceedings nullifies any possible analogy to cases such as *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp., supra,* in which stay orders, which involved the assertion of equitable jurisdic-

tion to control and perhaps ultimately defeat an action at law, were regarded as having the substantial effect of an injunction. No such comparison is possible here.[3/]

The various contentions by the Petitioner concerning the legal controversies between common and contract carriers in Colorado, and what the Petitioner has to say about the supposed perils and problems of proceeding with a trial and adjudication in the present[4/] case in advance of the final outcome of the *Miller* case, are completely wide of the mark and amount to little more than flights of fancy contrived to support the unsupportable proposition that the narrow and rather simple issue now before this Court is one of great public importance. These are matters which were all thoroughly thrashed out before the District Court and found to be without merit, and which although vigorously argued on appeal the Circuit Court properly refused

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3/ The total independence of this case and the proceedings before the Colorado Public Utilities Commission also obviates the concern reflected by Mr. Justice Black in his dissent in *Baltimore Contractors, Inc. v. Bodinger, supra,* cited by the petitioner for the proposition that "two trials, one unnecessary, may take longer and cost more than two appeals where one would do" (348 U.S. at 186). Unlike the situation in *Bodinger,* where it could be argued that entertaining the interlocutory appeal might have led to referring the case to arbitration, and therefore rendering a trial unnecessary, a review of the refusal of the stay in the present action could not, even if that refusal were reversed, lead to a binding adjudication of the present controversy by any means other than an ultimate trial and judgment in the District Court.

4/ The attempts of the petitioner to convey the impression that the Colorado Public Utilities Commission is the preferred forum for deciding this type of controversy, or that the Commission has some peculiar expertise in such cases, are not well taken. To the contrary, the Commission has no primary jurisdiction in the matter and the governing statutes expressly provide for direct actions and remedies in any court of competent jurisdiction. *Don Ward, Inc. v. Miller,* 154 Colo. 370, 390 P.2d 812. The Federal Courts in Colorado have exercised such jurisdiction in the past. *Colorado Milk Transport, Inc. v. Safeway Stores, Inc.* (10 Cir, 1959), 269 F.2d 755. The Colorado substantive law to be followed by the District Court in this action, as well as by the Commission in the *Miller* case, is already well charted. See, e.g., *McKay v. Public Utilities Commission,* 104 Colo. 402, 91 P.2d 965. The statute recently passed by the Colorado Legislature, which is printed in the appendix to the petition is totally irrelevant to the case at bar, since its only possible effect deals with the issuance of new authorizations to common carriers, not with the liability for unauthorized common carrier operations in issue here.

to reach. The short answer is that they have nothing to do with the question which is presented here, which is simply whether a long-standing and often applied rule limiting the appellate jurisdiction of Circuit Courts over interlocutory appeals justifies further review and restatement by the Court at this time. The Petitioner has utterly failed to supply adequate reasons for doing so, and none is believed to exist.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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August, 1967